

USED UP AND MISUSED: THE NATION STATE, THE EUROPEAN UNION AND THE INSISTENT PRESENCE OF THE COLONIAL

*Patricia Tuitt**

INTRODUCTION

Discovery, according to the political theorist, Carl Schmitt, “is not a timeless, universal and normative concept,”¹ but rather one that is limited—bound to a particular historical, even intellectual-historical situation: the “Age of Discovery.”²

Yet, through what means other than by placing Discovery within a normative framework can one account for the political community which, when deemed to have reached the limits of its economic and social efficacy, is imagined as waste or desolate, and, as a consequence of that designation, open to radical alteration? The European Union, still in the process of emergence from the old order of nation states, is a case in point. Similar to many legal entities that have preceded it, the E.U. is being settled by the migration of people and by the free movement of other factors of production. Also like so many legal entities that have come before it, the European Union survives (even thrives) on a discursive terrain, which places emphasis on the failings of the nation-state. As the author Peter Fitzpatrick has remarked, the presentation of the nation-state form as “the atavistic, savage nation of warlike and divisive assertion”³ paved the way for the emergence of the

* Professor of Law, Executive Dean, School of Law, Birkbeck, University of London. I would like to express my thanks to the editors—Seth A. Klein, Sheila R. Adams, and Jenai St. Hill—for their invaluable work on this Essay.

¹ CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 131 (G.L. Ulmen trans. 2006).

² *Id.*

³ PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 137 (2001).

European Union. The old, modern Europe had to be conceived of as thoroughly bankrupt before it could be appropriated to the resolutely post-national and post-modern aims of European integration.⁴

Schmitt describes and analyzes The Age of Discovery in his monograph, *The Nomos of the Earth*.⁵ This historical period is but one instance of Schmitt's general proposition that:

[I]n some form, the constitutive process of a land-appropriation is found at the beginning of every settled people, every commonwealth, every empire. This is true as well for the beginning of every historical epoch. Not only logically, but also historically, land appropriation precedes the order that follows from it. It constitutes the original spatial order, the source of all further concrete order and all further law.⁶

The age of discovery was a complex and involved history, conventionally dated from the early Fifteenth century to the late Seventeenth century. It was an age in which mass migration (not classic war or conquest) was deployed to extend the territories of a power or, crucially, to engineer "the destruction and/or transformation of other forms of social organisation and life"⁷ of communities assumed to be spent and useless. In spite of the press of legal and political theory relating to the EU, which collectively and aggressively asserts its *sui generis* character, it is time for the formation of the European Union to be measured against Schmitt's fundamental claim.

This Essay will assert that, through the migration and settlement of people and the movement of goods and capital, the savage, bankrupt estate of the old order in Europe has been appropriated. The way in which the member states of the E.U. have appropriated territories is similar to the migration and movement of units of production to the lands occupied by people considered primitive in earlier historical periods and in other geographical locations. Far from witnessing the birth of a political community

⁴ See, e.g., SIONAIDH DOUGLAS-SCOTT, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 13-16 (2002).

⁵ SCHMITT, *supra* note 1.

⁶ *Id.* at 48.

⁷ CATHERINE HALL, *Introduction: Thinking the Postcolonial, Thinking the Empire*, in *CULTURES OF EMPIRE: A READER: COLONISERS IN BRITAIN AND THE EMPIRE THE NINETEENTH AND TWENTIETH CENTURIES* 1, 5 (Catherine Hall ed., 2000).

without precise historical precedent, the origins of the European Union are distressingly familiar.

I. CARL SCHMITT, LAND APPROPRIATION, AND THE EUROPEAN UNION

This Essay does not attempt to suggest that no scholarly works exist that seek to interrogate the dominant characterisation of the European Union as a wholly unique political and legal entity. On the contrary, there is a respectable (but marginal) body of works which highlight the EU's adherence to classic modes of sovereign assertion, its embrace of a denigrated notion of citizenship, its treatment of resident non-nationals and asylum-seekers, and its overwhelming preoccupation with economic actors and spheres of activity.⁸ For example (and in seeming anticipation of this Essay by nearly a decade), Etienne Balibar refused to accept that the European Union had left behind the legacies of colonialism and imperialism that were so integral to the histories of member states of the supposed new Europe.⁹ Indeed, Balibar went so far as to invoke the idea of a "European apartheid."¹⁰

This Essay sits between the claim that the European Union has emerged from the old order of Europe and the opposing position that the EU is little more than the nation state writ large. Under this latter position, the EU is an entity that appears to be unlike the nation-state, but rather is one that has folded in its member states into a supposedly new polity (the European Union) which simply mimics and exaggerates the particular characteristics of the nation-state.¹¹ What lies in between these two positions is the intriguing truth: whilst not heralding a new kind of legal and political community, the European Union represents the "surprising change"¹² that Schmitt hoped would come about in legal and political thought and practice. His hope was a much sought after (but little anticipated) change that would once again make

⁸ *Id.* at 5.

⁹ See generally ÉTIENNE BALIBAR, *WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP* (2004).

¹⁰ *Id.* at 45.

¹¹ See Peter Fitzpatrick, *New Europe and Old Stories: Mythology and Legality in the European Union*, in *EUROPE'S OTHER: EUROPEAN LAW BETWEEN MODERNITY AND POST MODERNITY* 27-36 (Peter Fitzpatrick & James Bergeron eds., 1998).

¹² SCHMITT, *supra* note 1, at 335.

“relevant”¹³ the connection between “nomos”¹⁴ and the “appropriation of land.”¹⁵

The major contention of *The Nomos of the Earth*, a significant text on the international legal order, was that since the end of World War I, the word “nomos” had lost its fundamental relation to land appropriation. As a result, what to Schmitt ought to have been inconceivable—economic, political and social systems, anchored only by positive legal norms and conventions and not by the primary act of land capture—took hold of the political imagination.¹⁶ Thus, Schmitt would be pleased to learn that the force behind the European Union is the plain, old fashion taking of territory. The effective beginnings of the European Union can be located in the Rome Treaty.¹⁷ At the heart of European integration is the assertion of the right of European people to move freely across territory, similar to what has been seen in every epoch of history. This is a surprising change indeed, given that the European Union is routinely positioned as perhaps the most advanced instance of a globalized, deterritorialized space. The legal notion and practice of free movement remain at the core of the European Union’s constitutional and substantive fabric.

As I have argued elsewhere,¹⁸ those who seek to comprehend the precise legal nature of the European Union make much too little of the undeniable fact that the Treaty of Rome, which established the European Community, engineered the mass exodus of European people who were lured by the promise of economic advantage. Such projects of migration have leant force to virtually every legal community at the dawn of their existence.¹⁹ What this intimates, is that the emergence of the European Union has not occurred in such a way as to unsettle Schmitt’s claim that land appropriation is a condition precedent of the emergence of a legal and political community.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ Consolidated Version of the Treaty of the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 (formerly known as the Treaty of Rome).

¹⁸ *See e.g.*, Patricia Tuitt, *From the State to the Union: International Law and the Appropriation of the New Europe*, in *EVENTS: THE FORCE OF INTERNATIONAL LAW* (Fluer Johns et al. eds., 2010).

¹⁹ *Id.* at 177.

It is indisputable that the European Union marks the beginning of a new polity. However, this Essay disputes the claim that the EU is a new kind of political entity.

The EU is neither simply a continuum of the old order of nation states nor a *sui generis* legal community. The Rome Treaty put in circulation the beginnings of a political force that gestures toward the age of discovery. The key characteristics of this new political force are well known: Over a relatively short span of time, the old organisation of independent sovereign states of Europe have seen their borders hugely transformed, gradually in some spheres and more rapidly in others. At least in the movement of persons, capital, goods and services, the single market has replaced the old arrangement of independent and insular economic units. The very question of what geographical limit is comprised within the European space (admittedly always highly unstable and contested) has been placed more sharply in focus as the expansion of Europe appears to know no obvious limit.

The doctrine of direct effect,²⁰ which allows nationals of the EU to rely upon European law directly before their national courts, has made not only member states and EU institutions but also natural and legal persons, direct beneficiaries of the European Union's legal order. In virtually every discussion of the nature of the new European legal order, such innovations are paraded like flags marking its territorial compass. Of first importance for this account, nationals of member states of the EU are encouraged by various economically grounded free-movement rights to look across their increasingly porous borders to neighbouring locations with greedy eyes. Indeed, it is through their energies—their desire to discover the riches that the new Europe has in store—that has spurred the European revolution.

The Rome Treaty is the principal cause of the new distributions within Europe. It is often dubbed the axis upon which the EU revolves, indicating that the Rome Treaty is the primary law of the European Union or, to invoke Schmitt again, “the first measure of all subsequent measures”²¹ Hans Lindahl has played an important role in taking Schmitt's work beyond the seemingly narrow territorial understanding of space and place. Lindahl's recent work, in which he attempts to uncover the precise nature of

²⁰ See, e.g., PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXTS, CASES AND MATERIALS 275 (4th ed. 2008) (defining the criteria for establishing direct effect).

²¹ See SCHMITT, *supra* note 1, at 67.

the European Union's territorial form, is instructive. Thus, borrowing from Lindahl, it can be argued that it is through the movement of persons that the European Union seeks to enclose itself.²² However, as Lindahl cautions, it is not the mere act of closure that is important in elucidating the territorial character of any emerging polity, but rather the question of what the act gestures toward. To be more specific, any act of closure, which the Rome Treaty dispensation instructs, is "buil[t] on a prior closure."²³ That itself is conditioned upon the existence of a non-empirically grounded place to which any act of closure constantly refers.

This Essay argues that the non-empirically grounded place on which the European Union fixes itself and Schmitt's intellectual-historical situation are the same. Thus, it is in light of Lindahl's prescient observations that this Essay now returns to its point of beginning—to that something more than mere situated occurrence but something less than norm of Discovery. As Lindahl makes clear, the creation of a bounded space is not the result of a concrete act of placement but rather of an imaginative space that can "function as the origin of the EU only if it is not in empirical space and time."²⁴ This relation between an act of closure and the place to which the act of closure must refer if it is to complete itself is perhaps best summed up in Lindahl's assertion that to engineer a community within a deterritorialised space is an impossible task, because "[a] community must—literally—find a place in a continuous process of relating *to* space . . . part of what it means to be a community is to have to continuously reinterpret the claim to an own place."²⁵

Can it be said that the European Union's own place is to be found in constant reference to the period of sovereign appropriation that we know of as Discovery? First, one must take as the significant constitutive moment of the European Union the filling up of the European space through the movement of the factors of production, especially the movement of persons. If one accepts this proposition, then it is at least plausible to suggest that the European Union's own place is one in which the primary value, the intuitive sense, relates to the omnipresent need to enjoin European citizens in the task of effecting radical change over territory that is both

²² Hans Lindahl, *Finding a Place for Freedom, Security and Justice: The European Unity and Its Claim to Territorial Unity*, 29 EUR. L. REV. 461, 473 (2004).

²³ *Id.* at 476.

²⁴ *Id.* at 479.

²⁵ *Id.* at 465.

covered and governed. In short, there is no better description found of the European Union's claim to an own place than in the *Nomos of the Earth*. To reiterate the claim: The European Union, surprisingly for some, is the contemporary instance of a type of sovereign constituting that even Schmitt thought had effectively passed into history. Schmitt's reluctant acceptance that the era of land appropriation, by the time of his writing, had ended was closely tied to the conviction that the international order had effectively surpassed "the problems of founding anew and of transition" and had reached "some degree of calculability and security"²⁶

In modern times, some of the most concentrated set of interrogations into modes of founding, constituting, and transition have been posed in relation to the European Union. Even the most unschooled student of law cannot avoid encountering reams of paper devoted to an analysis of the legal character of the European Union. Its emergence, then, confounds Schmitt's belief that the political climate in which he wrote his thesis afforded no new political beginnings. The creation of the EU shows however that Schmitt correctly believed that where a new beginning is possible "in some form, the constitutive process of land-appropriation is found . . ."²⁷ According to Schmitt, the movement of the world into a realm of calculation would bring an end to the era of constituting. Chief among the many features of the post War international order which, as perceived by Schmitt, has caused *Nomos* to lose "its energy and majesty"²⁸ in modern constitutional theory and practice is the perceived end of the logical possibility and practical opportunities for land-appropriation.

And, in truth there are no spaces on earth that have not been covered and governed. However, recognizing this fact does not mean one necessarily has to accept that the era of constituting has passed. Rather, the question becomes in what manner such populated and governed spaces can still be appropriated. To answer this question, one must first appreciate that, as the discovery of the new world attests to, land appropriation can never exhaust itself merely by virtue of the finite nature of literal space. A great portion of the history that Schmitt deals with, in the section of *Nomos* devoted to the discovery of the new world, reveals how land-appropriation can operate in the face of a world, the separate units of which have once been appropriated, its lands already divided,

²⁶ See SCHMITT, *supra* note 1, at 341.

²⁷ See *id.* at 48.

²⁸ *Id.* at 67.

populated, and governed. If land-appropriation historically and logically precedes the settlement of any new political entity, then the question of how to appropriate an already appropriated world is one that logically was posed at the emergence of the European Union: a polity which indisputably arose from the densely populated and extensively governed territories of Europe.

Confronted with an earthly limit, post-war Europe saw in the degenerate nature of its existing political forms and its ineffectual economic structures a new Europe. Seen from the vantage point of the place against which the seeds of the European Union was born, new cannot be understood to denote the thing or entity that will arise from the degradation of the old order of nation states in Europe. Rather, it is evocative of a figuratively empty space, a point of transition and renewal. The new Europe, then, was a space that was ripe for change—not literally empty, but used up or misused. When we speak of the new Europe it is in a kind of shorthand to characterize the old arrangement of nation states as spent or obsolete. To be designated new is to bear the taint of the barbarian. The term “new” underscores a political and social order that has reached the limit of political efficacy.

II. TWENTY-FIRST CENTURY DISCOVERY

If Discovery is properly thought of as both an intellectual and historical situation, then it is difficult to ignore certain features of the emergence of the European Union. In particular, one cannot ignore the primacy of the four freedoms of the Treaty of Rome, which suggest that this intellectual situation has not disappeared. The intellectual situation that remains in political thought today and which the European Union claims as its own place through the act of closure that comes with the grant by the Treaty of Rome to the peoples of Europe to set forth on a discovery of the European space, is that which comes through as a legacy from the so-called golden age of discovery. All the certainties of the age have been brought forward to the present, above all the belief that any community which does not beckon towards the modern is effectively an empty space and of no account. In such a state, there is no enemy to conquer and no people with whom to negotiate a settlement. In such a state, it is possible to create a concrete order, not through invasion and conquest, but through migration and settlement.

The state of post-war Europe need not be exaggerated: It was not a barren wasteland, populated by men in bearskins. Rather,

what was to be transcended in the Discovery of Europe was the unwanted shadow of the modern at the dawn of the post-modern. The imperial continuum exists in the mode of the proposed settlement of the new Europe, which essentially is through migration of a particularly ruthless and frenzied momentum.

It is that process of constituting—that place which the European Union makes its own—that helps us make sense of the extraordinary prominence of free movement rights in the fashioning of the new Europe and the almost tyrannical pressure placed upon EU citizens to travel around the ever-increasing spaces of the new Europe. The appropriation of Europe to the exigencies of the European Union has occurred in the time-honoured fashion of encouraging the most courageous (most often too the economically advantaged) to test the new spaces to discover to what extent its seeming dissolution can yield hidden riches. The European Union surely presents us with a basis on which to question the wisdom of Schmitt's claim that "discovery . . . is not a timeless, universal, and normative concept."²⁹

²⁹ SCHMITT, *supra* note 1, at 131.